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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 523

SOUTHGATE BROKERAGE COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT*

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The findings, conclusions, and order of the Federal Trade Commission (R. 40-46) are not yet reported. The opinion of the Circuit Court of Appeals (R. 99) is reported in 150 F. 2d 607.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on July 19, 1945 (R. 107). The petition for a writ of certiorari was filed on October 18, 1945. The jurisdiction of this Court is invoked

under Section 11 of the Clayton Act, 38 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 2 (c) of the Clayton Act makes it unlawful for a buyer of goods to accept brokerage commissions or allowances from the seller of those goods.
2. Whether Section 2 (d) of the Clayton Act has any application to the payment or receipt of brokerage commissions.
3. Whether the Commission improperly rejected any evidence offered by the petitioner.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or in-

direct control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

STATEMENT

The Federal Trade Commission, in a proceeding charging violation of Section 2 (c) of the Clayton Act, made findings of fact which the petitioner does not challenge (Pet. 2), and which may be summarized as follows:

The petitioner's principal business is buying food products and other merchandise for its own account and reselling these goods (R. 42). The petitioner also acts as a broker in selling goods for others but this part of petitioner's business is not involved in the present proceeding (R. 42-43).

The merchandise which petitioner purchases in its own name and for its own account is stored in its warehouses and insured in its name and at its expense. Any taxes levied against it are paid by the petitioner. If the merchandise is damaged while in transit from the seller, claims for the loss are filed by the petitioner in its own name and for its own benefit. Petitioner determines the prices and terms at which it resells the merchandise and makes a profit or sustains a loss on the resale depending upon the course of the market following the original purchase. In short, petitioner's title to the goods is absolute. Some of the products which it purchases and resells bear its own private trade-marks or brands, which are supplied by petitioner and are affixed to the cans or other containers by the packer or canner. (R. 43.)

In many instances petitioner accepts from the sellers of such merchandise a brokerage commission or allowance and discounts in lieu of brokerage. The amount of brokerage thus received has been substantial and for the second half of the year 1941 it exceeded \$25,000. (R. 43-44.)

The Commission concluded that such receipt and acceptance of brokerage was in violation of Section 2 (c) of the Clayton Act (R. 44). It accordingly issued an order directing petitioner to cease and desist from accepting any brokerage

commission from any seller upon purchases which petitioner made for its own account (R. 46). The court below, on review of the order, unanimously upheld its validity (R. 99-108).

ARGUMENT

1. Section 2 (c) of the Clayton Act makes it unlawful for any person to pay, or to receive, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, either to the other party to the transaction or to an agent, representative, or other intermediary therein where such intermediary is acting for or on behalf of, or is subject to the control of, any party to the transaction other than the person by whom such compensation is granted or paid. As the court below said: "It is perfectly clear that this provision forbids payment of brokerage on a sale or purchase of goods to the other party to the transaction" (R. 102). See also *Oliver Bros. v. Federal Trade Commission*, 102 F. 2d 763, 769-777 (C. C. A. 4).

The sole purpose of the "except for services rendered" clause upon which petitioner relies was to make it clear that neither a seller nor a buyer is prohibited from paying his own agent for services rendered to him. This is explicitly stated in the conference report on the bill and in the earlier

report of the House Judiciary Committee.¹ As the court said in *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 674 (C. C. A. 3), certiorari denied, 308 U. S. 625: "At each stage of its enactment, paragraph (c) was declared to be an absolute prohibition of the payment of brokerage to buyers or buyers' representatives or agents."

To construe the "services rendered" clause as constituting a recognition by Congress that a buyer may perform services for the seller for

¹ The conference report (H. Rep. No. 2951, 74th Cong., 2d sess., p. 7) states:

"Subsection (c) deals with brokerage. It is the same as subsection (b) in the House bill, which in turn is the same as subsection (c) in the Senate amendment, except that the words 'except for services rendered,' as contained in the House bill, do not appear in the Senate amendment. In the conference report these words are retained, so that, with adjacent language, it reads:

"* * * any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise, * * *

"With the words of the House bill thus retained, this subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other."

The earlier report on the bill by the House Judiciary Committee is substantially to the same effect (H. Rep. No. 2287, 74th Cong., 2d sess., pp. 14-15).

which the seller may pay and the buyer receive compensation by way of a brokerage fee or commission "makes much of its [the Section's] language meaningless; it does violence to the purpose of the Act and has been explicitly rejected in other circuits." *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393, 398 (C. C. A. 1). So to construe the clause "would largely destroy the statute, and nullify its plain intent." *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. 2d 268, 270 (C. C. A. 5), certiorari denied, 310 U. S. 638.

From the enactment of the Robinson-Patman Act to date, both the Commission and the courts have consistently construed Section 2 (c) as an absolute and unconditional prohibition of the payment of brokerage by a seller to a buyer or his agent upon the buyer's own purchases.² Consequently, petitioner's contention that the Commission's order is invalid because the Commission

² *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687, 690-691 (C. C. A. 2), certiorari denied, 305 U. S. 634; *Oliver Bros. v. Federal Trade Commission*, 102 F. 2d 763, 767-768 (C. C. A. 4); *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 673-674 (C. C. A. 3), certiorari denied, 308 U. S. 625; *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. 2d 268, 270 (C. C. A. 5), certiorari denied, 310 U. S. 638; *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393, 398 (C. C. A. 1); *Jarrett v. Pittsburgh Plate Glass Co.*, 131 F. 2d 674, 676 (C. C. A. 5); *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F. 2d 12, 14-15 (C. C. A. 6); *Modern Marketing Service v. Federal Trade Commission*, 149 F. 2d 970, 978 (C. C. A. 7).

failed to find that petitioner renders no services to sellers is without merit. All the Commission had to find was that petitioner was the buyer and was receiving brokerage.

2. Petitioner also contends that Section 2 (d) of the Act authorizes receipt by a buyer of a brokerage commission if the seller offers substantially the same commission to other similarly circumstanced buyers. The Section makes it unlawful for a person to pay anything of value to his customer in consideration for "any services or facilities furnished by or through such customer" in connection with the processing, handling or sale of any commodity sold by such customer, unless such payment is available on proportionally equal terms to all other customers competing in the distribution of such commodity.

As the court below said, Section 2 (d) "has no relation to payment of brokerage to buyers or their agents, which is dealt with in the preceding subsection, but is intended to prevent discriminatory payments by seller to buyer on account of services actually rendered the seller" (R. 106). The court further said (*ibid.*):

It [Sec. 2 (d)] is commonly referred to as the "advertising allowance" section of the act; and as explained by Representative Utterback in presenting the conference report to the House the words "services or facilities," rather than the term "advertising allowance" were employed for the pur-

pose of making the "prohibitions of the bill * * * intentionally broader * * * in order to prevent evasion." 80 Cong. Rec. 9418. * * * It is little short of absurd to argue that the receipt by a buyer of brokerage on his purchases, forbidden by subsection (c), is validated by subsection (d), the purpose of which is to forbid discriminatory payments for services actually rendered by buyers.

3. Petitioner contends that the Commission erred in rejecting evidence which it offered to show that it performed certain services for sellers, the alleged services consisting of "promoting, offering for sale, selling, ordering, receiving, adjusting shortage or damage claims, handling, warehousing, distributing, invoicing, collecting, and assumption of credit risks" (R. 11). The court below, in holding that this evidence had been properly rejected, said that the crucial fact is that all of the alleged services were rendered by petitioner "in connection with its own purchase, ownership or resale of the goods; and these services it renders, not to those from whom the goods are purchased, but to itself" (R. 104). In addition, since Section 2 (c) unconditionally forbids the receipt by a buyer of brokerage upon his own purchases, and since the Commission's order applies only to "brokerage" or payment "in lieu thereof" (R. 46) and not to compensation for other services, the proffered evidence was imma-

terial to the issues in this case, even if the "services" proposed to be shown are regarded as having been of some incidental benefit to the sellers from whom petitioner purchased.

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1945.

